Remarks/Arguments

This Response is provided in response to a Non-Final Office Action mailed November 16, 2007, in which the Examiner rejected claims 1-4, 15-17, and 21 under 35 U.S.C. §102(e) as being anticipated over the prior art, and in which the Examiner rejected claims 5-9, 10, 11, 12, 13, 14, 17-20, and 22-29 under 35 U.S.C.§103(a) as being unpatentable over prior art. In view of the present remarks, Applicants believe that claims 1-29 are presently in condition for allowance.

Rejection of Claims Under 35 U.S.C. §102(e)

The Office Action rejected claims 1-4, 15-17 and 21 under 35 U.S.C. §102(e) as being anticipated by United States Patent No. 5,627,766 issued to Paul A. Beaven, May 6, 1997 (hereinafter "Beaven"). Applicants respectfully traverse this rejection.

Legal Precedent

Anticipation means a lack of novelty, and is a question of fact which is reviewed by the reviewing court using a substantial evidence standard. *Brown v. 3M*, 60 USPQ2d 1375 (Fed. Cir. 2001); *Baxter Int'l, Inc. v. McGaw, Inc.*, 47 USPQ2d 1225 (Fed. Cir. 1998). To anticipate a claim, every limitation of the claim must be found in a single prior art reference, arranged as in the claim. *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 58 USPQ2d 1286 (Fed. Cir. 2001). *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 122 S.Ct. 1831 (2002). Each such limitation must be found either expressly or inherently in the prior art reference. *Schering Corporation v. Geneva Pharmaceuticals, Inc.*, 02-1540, Decided August 1, 2003 (Fed. Cir. 2003). Accordingly, Applicants need only point to a single element not found in the cited reference to demonstrate that the cited reference fails to anticipate the claimed subject matter.

The cited reference fails to show processor initiated simultaneous execution of the first and the second non-sequential tests of a first type over two paths as recited by independent claims 1, 15, 16, and 21.

Current claims 1, 15, 16, and 21 recite conducting a first performance test of a first type over a first path of the plurality of paths between a first and second device; conducting a second performance test of the first type over a second path of the plurality of paths between the first and second device; and wherein a processor initiates the simultaneous execution of the first and the second non-sequential performance tests. The Examiner is reminded that pictorially, this can be illustrated by the following Figure 1:

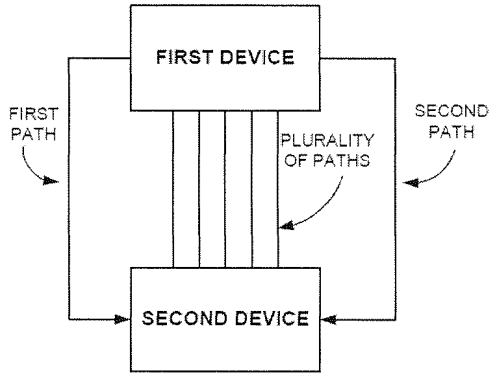

FIG. 1

The Examiner has relied on Beaven to anticipate the aforementioned claim recitations. However, unlike the language recited in claims 1, 15, 16, and 21, Beaven fails to describe simultaneous execution of a test of a first type over a first and second path. Beaven describes monitoring a network from a single point of control (POC). Beaven, col. 2, lines 40-44. This POC transmits a test to a *single* node test program entity (NTP). *Id* at col. 2, lines 45-49; col. 3, lines 4-7. The single NTP then transmits a reply message to the POC and forwards the original transmission from the POC to other NTPs. *Id* at col. 2, lines 50-54; col. 3, lines 10-16. These NTPs then transmit reply messages to the POC while forwarding on the original transmission from the POC to subsequent NTPs. *Id* at 55-59; col. 3, lines 10-16. The key aspect of this system is that the POC initially injects *a single test message* into the network as a performance test. Beaven, col. 4, lines 5-8. Thus, even though Beaven discusses simultaneous monitoring of multiple connections between two nodes (col. 4, lines 8-11), the simultaneous running of the tests is initiated "at *different*

nodes." Beaven, col. 4, lines 11-12 (emphasis added), rather than being initiated simultaneously from a single processor.

Contrast this with the claim recitations of independent claims 1, 15, 16, and 21 whereby the two paths *share the same nodes*, i.e. the first device and the second device. The paths described in claims 1, 15, 16, and 21 are between a first device (i.e. a first node) and a second device (i.e. a second node). The processor executes tests simultaneously at the first device for transmission across a first and second path to the second device. In this manner, the two tests are executed *from the same device* and not from *different nodes* as described in Beaven. Accordingly, Beaven cannot anticipate independent claims 1, 15, 16, and 21.

Secondly, since Beaven describes, at best, initiating a test by sending a message to a first NTP, this involves initiating a *single message* along a *single path*, namely the path between the POC and the first NTP. This cannot read on conducting a *first test* of a first type along a *first path*, and a *second test* of a first type along a *second path* because there is only *one test initiated along a single path* in Beaven. Furthermore, since the POC initiates only a *single message*, Beaven cannot anticipate a processor initiating the *simultaneous execution* of non-sequential tests. Only one test is initiated by the POC of Beaven, and as such, Beaven does not anticipate *simultaneous execution* of two *processor initiated* tests.

Accordingly, Beaven fails to anticipate every recitation of independent claims 1, 15, 16, and 21. Furthermore, based at least upon their dependency to claims 1, 16, and 21, claims 2-14, 17-20, and 22-29 are not anticipated by Beaven. For at least these reasons among others, Applicants respectfully request withdrawal of the rejections under 35 U.S.C. § 102, and passage of claims 1-29 to allowance.

Rejection of Claims Under 35 U.S.C. §103(a)

The Office Action further rejected claims 5-9, 13, 17-20, and 22-29 under 35 U.S.C. §103(a) as being unpatentable over Beaven in view of United States Patent No. 6,763,380

issued to Kim Irvin Mayton, et al., July 13, 2004 (hereinafter "Mayton"). This rejection is respectfully traversed.

Legal Precedent

To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). If an independent claim is nonobvious under 35 U.S.C. §103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). The Supreme Court has recently stated that, "[A] patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art," and that "A court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions." *KSR Intern. Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1731.

The cited references, taken alone or in combination, fail to teach or suggest features recited by claims 5-9, 13, 17-20, and 22-29.

Claims 5-9, 13, 17-20, and 22-29 depend from independent claims 1, 16, and 21 and include all recitations of the independent claims. As discussed above in the section titled "Rejection of Claims Under 35 U.S.C. §102(e)," Beaven fails to teach or suggest the recitations of independent claims 1, 16, and 21. Mayton supplies neither the missing elements nor a showing for the combinability of the two references to teach the recitations of claims 1, 16, or 21. Due to at least the dependencies of claims 5-9, 13, 17-20, and 22-29 on independent claims 1, 16, and 21, the cited references, taken alone or in hypothetical combination, cannot render obvious claims 5-9, 13, 17-20, and 22-29. For at least these reasons, as well as for reasons previously presented, Applicants request withdrawal of the rejection of claims 5-9, 13, 17-20, and 22-29 under 35 U.S.C. §103(a), and passage of same to allowance.

Rejection of Claims Under 35 U.S.C. §103(a)

The Examiner further rejected claims 10, 11, and 14 under 35 U.S.C. §103(a) as being unpatentable over Beaven in view of Mayton and further in view of United States Patent Number 6,360,268, issued to Stephen Silva, et al., March 19, 2002 (hereinafter "Silva").

The cited references, taken alone or in combination, fail to teach or suggest features recited by claim 10, 11, and 14.

As discussed above in the section titled "Rejection of Claims Under 35 U.S.C. §102(e)," neither Beaven nor Mayton teaches or suggests the recitations of claim 1. Silva supplies neither the missing elements nor a showing for the combinability of the references. Thus, neither Beaven, Mayton, nor Silva, taken alone or in combination, teach the above recitations of claim 1. Due to at least the dependency of claims 10, 11, and 14 on claim 1, the cited references, taken alone or in hypothetical combination, cannot render obvious claims 10, 11, and 14. For at least these reasons, as well as for reasons previously presented, Applicants request withdrawal of the rejection of claims 10, 11, and 14 under 35 U.S.C. §103(a), and passage of same to allowance.

Rejection of Claims Under 35 U.S.C. §103(a)

The Examiner further rejected claim 12 under 35 U.S.C. §103(a) as being unpatentable over Beaven in view of Mayton and further in view of United States Publication Number 2003/0036865, inventor ZhangQing Zhuo, et al., February 20, 2003 (hereinafter "Zhou").

The cited references, taken alone or in combination, fail to teach or suggest features recited by claim 12.

As discussed above, neither Beaven nor Mayton teach or suggest the amended recitations of claim 1. Zhuo supplies neither the missing elements nor a showing for the combinability of the two references. Thus, neither Beaven, Mayton, nor Zhuo, taken alone or in combination, teach the above recitations of claim 1. Due to at least the dependency of

claim 12 on claim 1, the cited references, taken alone or in hypothetical combination, cannot render obvious claim 12. For at least these reasons, as well as for reasons previously presented, Applicants request withdrawal of the rejection of claim 12 under 35 U.S.C. §103(a), and passage of same to allowance.

Conclusion

Applicants respectfully submit that all pending claims should be in condition for allowance. This Response is intended to be a complete response to the Non-Final Office Action mailed November 16, 2007.

However, if the Examiner believes certain amendments are necessary to clarify the present claims or if the Examiner wishes to resolve any other issues by way of a telephone conference, the Examiner is kindly invited to contact the undersigned attorney at the telephone number indicated below.

Respectfully submitted,

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